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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT EUGENE WASHINGTON, Defendant and Appellant.	F056938 (Super. Ct. No. RF005212A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Tim Warriner, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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Robert Eugene Washington appeals his conviction for assault, contending that his trial counsel rendered ineffective assistance by (1) failing to request an alibi instruction

and (2) failing to object to the prosecutor's argument suggesting the defense had the burden of proving the alibi. In addition, Washington contends he is entitled to three more days of presentence custody credits.

Based on precedent established by the California Supreme Court, we conclude defense counsel's failure to request an alibi instruction, such as CALJIC No. 4.50 or CALCRIM No. 3400, was not prejudicial. (*People v. Alcala* (1992) 4 Cal.4th 742, 804-805 [where jury was instructed to consider all evidence and to acquit defendant if it entertained a reasonable doubt of guilt, failure to request CALJIC No. 4.50 "clearly was not prejudicial"].) Also, we conclude that the prosecutor's closing argument did not create a reasonable likelihood that the jury would require Washington to prove his alibi defense or otherwise misapply the burden of proof.

Washington's conviction will be affirmed and his sentence will be modified to reflect an additional three days of presentence custody credits.

PROCEDURAL HISTORY

In July 2008, Washington was charged by amended information with assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1); count 1) and mayhem (§ 203, count 2). Count 1 included a great bodily injury enhancement pursuant to section 12022.7.

On July 14, 2008, Washington's jury trial began. The jury found him guilty of count 1, finding the great bodily injury enhancement to be true, and found him not guilty of count 2.

In August 2008, the trial court granted Washington's request to be represented by a different attorney. The new attorney filed a motion for new trial on the ground that previous counsel had provided ineffective assistance by failing to interview the defense witnesses prior to calling them. The motion for new trial did not raise any of the issues pursued in this appeal.

In January 2009, the trial court heard and denied Washington's motion for a new trial. On the same day, the trial court sentenced Washington to state prison for an aggregate six-year term, which consisted of three years as the middle term on the assault conviction and three consecutive years for the great bodily injury enhancement. The trial court gave Washington 207 days of credit—180 days for actual custody and 27 days for conduct.

The next day, Washington filed a notice of appeal.

FACTS

The issues raised by Washington and not conceded by respondent can be resolved based on (1) existing precedent and (2) an interpretation of the prosecutor's closing argument. A detailed description of the testimony regarding the assault of Gomer Stowell and Washington's alibi are not essential to the resolution of this appeal. Consequently, each side's version of what happened will be stated in general terms.

On Mother's Day, May 13, 2007, shortly before sundown, some men caused a disturbance outside the residence of Jacqueline Kennedy in Ridgecrest, California. Gomer Stowell went outside to tell the men that the police had been called and that they should leave. Someone ran up to Stowell and started swinging. Two other men grabbed Stowell from behind and threw him down. Three or four men kicked Stowell until he blacked out. At trial, Stowell was unable to identify any of the attackers.

As a result of the attack, Stowell suffered internal bleeding and other injuries that required surgery. His spleen was removed, his heart and lungs were bruised, and part of his intestines had been ruptured.

At approximately 4:00 a.m. on May 14, 2007, a police officer showed Kennedy a lineup containing six photographs. Kennedy picked the photograph of Washington as one of the people involved in the attack. Later that day, a second witness picked Washington out of a photographic lineup.

On the evening of May 14, 2007, Washington was arrested. Washington waived his right to remain silent and told the police that (1) he had been at the Kennedy residence the day before, (2) he had gone there looking for Leon Lewis, Kennedy's nephew, because of an incident that occurred between Lewis and Washington's girlfriend,[1] (3) he got into an argument with Kennedy and another woman, (4) while he was there an altercation took place in the driveway, and (5) the altercation involved one person from the residence and three or four other people that he did not know. Washington specifically denied being involved in the altercation.

At trial, the defense called Nowicki and she testified about the incident in her home with Lewis. When Washington returned to Nowicki's home, she was frantic and took about an hour to calm down and explain to Washington what had happened. Washington became upset.

Later that afternoon, Washington and Nowicki got ready to go to Washington's grandmother's house. His grandmother, Mildred Parker, held a party for Mother's Day that about 20 to 30 people, mostly family members, attended. Washington took Nowicki to his grandmother's house for the party and dropped her there between 2:30 and 3:00 p.m. Then Washington left and did not return to the party until about an hour later. Nowicki testified that once Washington returned to the party he did not leave again until they went home together. Similarly, Washington's grandmother answered "No" when asked if he "left the party at any time between the time he arrived after he dropped off [Nowicki] until he sent everybody home."

Stanella Williams testified that (1) she attended the party at Mildred Parker's home from around 4:00 until 10:00 that night and (2) Washington was at the party when

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[1]Leon Lewis and Catherine Nowicki, Washington's fiancée, had a relationship from 2001 through 2003 and had a child together. The incident occurred earlier that day when Lewis came to Nowicki's residence, while Washington was at the store, and forced himself on Nowicki and made demands.

she arrived and she did not see him leave before her. She also testified that she was not with Washington at the party all of the time, but most of the time.

Williams testified she took a photograph at the party around 7:30 or 8:00 while there was a little bit of sun left. She stated that Washington was in the photograph.

Damena Washington, appellant's sister, testified that she was in the photograph and that it was taken when it was almost dark, which she estimated as between 6:00 and 7:00. She also testified that her brother was in the photograph and that he left the party around 10:00 or 11:00.

DISCUSSION

I. Ineffective Assistance of Counsel

A. Basic Principles

The Sixth Amendment to the United States Constitution, made applicable to the states through the due process clause of the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." A defendant claiming a constitutional violation based on ineffective assistance of counsel must show "counsel's representation fell below an objective standard of reasonableness," and "the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; see *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.)

In assessing the first prong of the *Strickland* test, there is a strong presumption that counsel's performance fell within the range of reasonable professional assistance. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 689.) As a result, a reviewing court will not second-guess counsel's reasonable tactical decisions. (*People v. Riel* (2000) 22 Cal.4th 1153, 1185.) Furthermore, trial counsel is not required to undertake futile acts, such as filing meritless motions. (*People v. Anderson* (2001) 25 Cal.4th 543, 587; *People v. Hines* (1997) 15 Cal.4th 997, 1038, fn. 5.)

The second prong of the *Strickland* test (prejudice) may be examined either before or after the first prong—the sequence of the analysis is not important. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.) Recently, the California Supreme Court stated that the test under the second prong of an ineffective assistance claim was "whether there was '"'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"'" (*People v. Friend* (2009) 47 Cal.4th 1, 46.)

B. Failure to Request an Alibi Instruction

Appellant argues that his trial counsel's representation fell below an objective standard of reasonableness because competent counsel would have requested an alibi instruction.

Appellant cites *Commonwealth v. Mikell* (1999) 556 Pa. 509 [729 A.2d 566] as a case in which counsel's "failure to request an alibi instruction constituted constitutionally ineffective assistance of counsel such as to entitle [defendant] to a new trial." (*Id*. at p. 518 [729 A.2d at p. 571].) Appellant has cited, and we have located, no California case in which a defense attorney's failure to request an alibi instruction was determined to violate a defendant's right to effective assistance of counsel.

The California authority relied on by appellant includes the general proposition that defense counsel's duty "includes careful preparation of and request for all instructions … necessary to explain … the legal theories upon which his defense rests." (*People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 148, 165.) Also, appellant cites *People v. Freeman* (1978) 22 Cal.3d 434 for the proposition that an alibi instruction is mandatory if alibi witnesses are presented and the instruction is requested.[2] (*Freeman*, at pp. 437-438.)

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[2]The Arizona Supreme Court described this as the majority view. (*State v. Rodriguez* (1998) 192 Ariz. 58, 62 [961 P.2d 1006, 1010].) In that case, the court rejected the minority

In *Freeman*, the California Supreme Court concluded trial courts do not have a sua sponte duty to give an alibi instruction in cases where an alibi defense is raised by the evidence presented. (*People v. Freeman*, *supra*, 22 Cal.3d at p. 437.) As rationale, the court stated:

> "In the present case, as noted above, the jury was instructed to acquit defendant if the prosecution failed to establish his guilt beyond a reasonable doubt. It would have been redundant to have required an additional instruction which directed the jury to acquit if a reasonable doubt existed regarding defendant's presence during the crime. As stated in [*People v. Whitson* (1944) 25 Cal.2d 593 at page 604], no juror could possibly be misled by the failure to instruct on the significance of defendant's alibi defense." (*Id*. at p. 438.)

Fourteen years later, the California Supreme Court revisited the question whether the trial court has a sua sponte duty to instruct the jury pursuant to CALJIC No. 4.50 when a defendant raises an alibi defense. (*People v. Alcala*, *supra*, 4 Cal.4th at pp. 803, 804.) The court again refused to impose a sua sponte duty, stating:

> "For the purpose of instructing with respect to an alibi defense, it is sufficient that the jury be instructed generally to consider all the evidence, and to acquit the defendant in the event it entertains a reasonable doubt regarding his or her guilt. [Citation.]" (*Ibid*.)

The defendant in *People v. Alcala* also argued that he was denied effective assistance of counsel by his attorney's failure to request that the jury be instructed pursuant to CALJIC Nos. 2.91 (identity), 2.92 (eyewitness identification factors) and 4.50 (alibi). (*People v. Alcala*, *supra*, 4 Cal.4th at p. 804.) The court rejected this argument, simply stating: "In light of our determination that the instructions given adequately apprised the jury of all relevant legal principles, any failure by counsel clearly was not prejudicial." (*Id*. at pp. 804-805.)

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view that a trial court, though requested, need not separately instruct on alibi. (*Id*. at p. 63 [192 Ariz. at p. 1011].)

In this case, the instructions given the jury included CALCRIM Nos. 220 (reasonable doubt), 222 (evidence), and 226 (witnesses). Based on the fact that these instructions were given and the precedent established by *People v. Alcala*, *supra*, 4 Cal.4th 742, we conclude that defense counsel's failure to request an alibi instruction was not prejudicial.[3] Therefore, Washington was not deprived of his Sixth Amendment right to the effective assistance of counsel.

C. Failure to Object to Prosecutor's Argument

1. The argument in question

During closing argument, the prosecutor asserted that "this case comes down to a lot of witness credibility" and then reviewed some of the factors relating to the reliability of witnesses. The prosecutor continued by arguing:

> "Now, also on that instruction—that's instruction 226—it says—now, it's tough to read this, but it says and I highlighted it: 'Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. Two people may witness the same event, yet see or hear it differently.'
>
> "And that's true in everything. People are going to have different vantage points; they're going to remember things a little different. This is over a year ago. We're asking people to describe what happened in a very short period of time. So there's going to be discrepancies and you need to decide whether they're important or not.
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> "Another one is all available evidence isn't required by both sides. And the reason for that is simple. You never know what happens. I mean, there could be a witness you were sitting there wishing, 'Gosh, I wish I had heard from that witness.' But that witness could be dead, she could have moved away, might not be able to find her, could have been an attorney decision by either one of us not to call. It could be all sorts of reasons. And all that instruction is saying is, 'Don't speculate. Just deal with what

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[3]Because of this conclusion, we need not address whether the decision to forgo an alibi instruction was a reasonable tactical choice. (See *Schmitt v. State* (2001) 140 Md.App. 1, 34 [779 A.2d 1004, 1023] [trial counsel chose not to request an alibi instruction based on his strategic assessment that the instruction was a meaningless redundancy; appellate court deferred to this choice and found his performance was not deficient].)

you have.' What you have is what you have and you can't look outside that. You can't say, 'What if?' You have to say, 'This is what we have, is he guilty based on this?'

"Now there is a special instruction, it's number 302.[4] And it tells you what to do if there is a conflict in the evidence. And in this case, there's conflicting evidence. We got people saying he was there, he did it. We got other people saying, 'No, he was at a party.' Well, you can't say, 'Well, he was at a party, that's reasonable. Okay. Reasonable doubt, not guilty.' No. That's not how it works. You've got conflicting evidence, you've got to reconcile. He can't have been—if you believe everything that the witnesses say on the defense side, that he was there 100 percent of the time, and that everything the prosecution witnesses said would be a lie. And if you determine that, then he would be not guilty.

"But if you find that the prosecution witnesses have some credibility and you have to reconcile that conflict—and I'll go through that more in depth—but just because there's two stories doesn't mean, 'Okay. Reasonable doubt.' You have to work through and determine what the truth is and did he do it?

"Because let's face it, there's a lot of criminal cases where defendants find themselves in a unique position in saying, 'I didn't do it,' which is essentially not guilty of what he's doing. And I'm proving by the evidence that he did."

The prosecutor followed up his comment providing more depth on reconciling conflicts by discussing the testimony of the witnesses that presented different versions about where Washington was on the day of the assault. The prosecutor told the jurors the testimony by the defense witnesses that Washington was at the party could be reconciled with Washington's participation in the assault because "he could have easily slipped out and gone to that residence" where the assault occurred.

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[4]Using CALCRIM No. 302, the trial court instructed the jury: "If you determine there's a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

2. Contentions of the parties

On appeal, Washington interprets the prosecutor's argument as suggesting that the defense had the burden of proving the truth of the alibi, which he contends was a misstatement of law and, thus, prosecutorial misconduct. Washington further contends that effective counsel would have objected to the prosecutor's comments and requested the court to admonish the jury.

Respondent contends there was no basis for a defense objection "because the prosecutorial comments were wholly unobjectionable and were indeed, appropriate comments on the role of the jurors …."

3. Legal standard for interpreting prosecutor's argument

When a defendant asserts prosecutorial misconduct and the parties disagree over how the prosecutor's argument to the jury should be interpreted, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Friend*, *supra*, 47 Cal.4th at p. 29.) This reasonable-likelihood inquiry is the same inquiry used when a defendant claims that a jury instruction is ambiguous. (*People v. Osband* (1996) 13 Cal.4th 622, 679.)

4. Analysis

Washington's theory that there was a reasonable likelihood that the jury construed the prosecutor's argument in a fashion that undermined the proof by a reasonable doubt requirement focuses on the prosecutor's use of the term "reconcile," which does not appear in CALCRIM No. 302, and the example given of a situation where the jury should find Washington not guilty.

Washington argues that the prosecutor misstated the law when he noted the conflicting evidence and said "you've got to reconcile" and "you have to reconcile that conflict …."

Washington correctly states that the term "reconcile" is not included in CALCRIM No. 302. Nevertheless, the prosecutor's use of that term does not necessarily undermine

the reasonable doubt instruction. We must look at the argument as a whole and determine whether the statements were reasonably likely to cause the jury to misapply the law. What did the prosecutor mean when he told the jury it had to reconcile the conflict? He explained that he would go through it in more depth, "but just because there's two stories doesn't mean, 'Okay. Reasonable Doubt.' You have to work through and determine what the truth is and did he do it?"

Our examination of the prosecutor's use of the term "reconcile" in context leads us to conclude that the jury would not have been misled by the prosecutor's argument. When read in context, the prosecutor used the term "reconcile" to mean that the jury had to work through the evidence that presented the two different stories and "determine what the truth is and did he do it." In other words, the jury could not simply stop its analysis and determine a reasonable doubt existed just because two different stories were presented by the witnesses.

In addition, the prosecutor followed up his statement that he would go into more depth by reviewing the testimony of particular witnesses and arguing that it was possible that Washington was at the party most of the day, but slipped away long enough to assault the victim. In short, the prosecutor made the point that Washington could have been at the party for most of the day and still have had time to participate in the attack on Gomer Stowell. Thus, the testimony that Washington was at the party was not necessarily inconsistent with the testimony that he committed the assault.

Consequently, we conclude that the prosecution's reference to reconciling the testimony was not reasonably likely to cause the jury to misconstrue or misapply the reasonable doubt requirement.

Washington also argued that the example given by the prosecutor was inappropriate because it suggested there was only one way that Washington could be found not guilty. The example in question was given to the jury as follows:

> "[I]f you believe everything that the witnesses say on the defense side, that he was there 100 percent of the time, and that everything the prosecution witnesses said would be a lie. And if you determine that, then he would be not guilty."

In Washington's view, this example "improperly suggested that the defense had the burden of proving the truth of the alibi beyond a reasonable doubt" and was "a misleading example of the exclusive way that Washington could be found not guilty …." We disagree with this interpretation of the prosecutor's argument. First, there is nothing in the example that references the burden of proof and implies the defense bears the burden of proving his witnesses were truthful. Second, the prosecutor did not use language that implied the example was the only way the alibi defense could result in a finding of not guilty. Rather, this implication was negated two sentences later when the prosecutor said, "You have to work through and determine what the truth is and did he do it." The statement about determining the truth and determining whether Washington committed the offense does not suggest the burden of proof has shifted—if anything, it brings the jury back to the basic question of guilt and the reasonable doubt standard that underlies that basic question.

In summary, we conclude there was not a reasonable likelihood that the jury construed or applied the prosecutor's arguments in an objectionable fashion. Therefore, no deficient performance was established by the defense counsel's failure to object to those arguments.

II. Pretrial Custody Credit

Washington contends the trial court's award of 180 actual days of custody credit is in error because he should have been credited for 183 actual days. Washington contends that he was not given credit for the initial three days he spent in custody from the time of his arrest until he was released on bail.

The Attorney General agrees with Washington that (1) his custody credits need to be corrected and (2) the amount of the correction should be three additional days based

on the time he actually was in custody. We agree with the parties and will modify the sentence accordingly.

DISPOSITION

The judgment of conviction is affirmed. The judgment of sentence is modified to strike the original award of presentence credits reflected in item 14, "CREDIT FOR TIME SERVED," of the abstract of judgment and to award instead 210 days of total credits, composed of 183 days of actual custody credit and 27 days of conduct credit. As modified, the judgment of sentence is affirmed. The clerk of the superior court shall prepare and send to the Department of Corrections and Rehabilitation a certified copy of the corrected abstract of judgment.

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DAWSON, J.

WE CONCUR:

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CORNELL, Acting P.J.

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POOCHIGIAN, J.